No. 14,568

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN D. SHAW,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF OF APPELLANT.

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JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction by the United States District Court, District of Alaska.

The offense charged in the information is a violation of Section 284, Title 18, United States Code. This Court has jurisdiction under provisions of 28 United States Code, Sections 1291, 1294(2).

THE FACTS.

The appellant, John D. Shaw, from 1944 until 1951 was employed by the Alaska Railroad as a train dispatcher.

Prior to coming to Alaska in 1944 he had studied law at California and by reason of adversity had been unable to complete his college work.

Possessed of a continuing desire to complete his studies in law he registered in 1947, under provisions of the Alaska Code, as a law clerk in the office of a practicing attorney. (TR 177.)

For a period of four years, by working a regular shift for the Alaska Railroad at night, he was able to complete his prescribed course of study and incidentally the requirements of his legal clerkship. He applied for and was approved for the Alaska Bar and upon taking the examination was admitted to practice in November of 1951. Promptly thereafter he resigned his position as train dispatcher and commenced to practice law.

Meanwhile other events were taking shape on the Alaska Railroad which resulted in a collision at Rainbow Station on the main line tracks of the railroad on March 24, 1950. Extra train No. 562 was proceeding south towards Seward when passing around a blind curve it ran head on into a track car towing several manhaul cars, proceeding north toward a construction camp at Rainbow. The manhaul cars were carrying as passengers a group of construction workers, performing railroad rehabilitation work for Morrison-Knudsen, a private contractor. The impact of train and track car killed two men and critically injured a dozen others.

This collision occurred at approximately 5:15 P.M. while appellant was on duty in the Anchorage office.

The movement of trains is controlled in the dispatcher's office, and the actual control of train movements, at the time of day indicated, is through two control boards. One board, known as the "north board," controls the train movements north of Curry. The other board, known as the "south board", controls train movements south of Curry. Rainbow, the scene of the collision, is south of Curry and Anchorage, and comes under the south control board. Appellant was operating the north board. (TR 207.) Train dispatcher, Kerwin Frank, was operating the south board. (TR 155.) The time being after regular working hours and the regular chief dispatcher having left for the day, Shaw, the oldest in terms of seniority, was also acting as chief dispatcher.

When the collision occurred one of the train crew walked to the station of Rainbow and called the dispatcher's office and reported the accident. Kerwin Frank, dispatcher on the south board, took the report and was so emotionally upset by the deaths and injuries he could not issue the necessary emergency instructions to the persons in charge at the scene of the collision. He called to appellant and asked him to take over the south board telephone and handle the matter. Appellant took over the south board, talked to the train crew, ordered the dead and injured to be placed aboard and directed the train's return to Anchorage. While the return trip was being made, appellant arranged for ambulances to meet the train and for doctors and hospitalization. Upon completion of this emergency service appellant made a report of the incident on the train dispatchers' sheet. (TR 87.)

Within a short time the news of the accident was broadcast over local radio stations and the following day the story was carried in great detail by local newspapers. (TR 116, 117, 206.)

The injured men, while hospitalized, required legal counsel regarding compensation and other matters and a local attorney was retained by them for that purpose, and for a period of nearly two years thereafter this attorney advised and counseled with these men and looked after their legal rights. (TR 179.)

Just prior to the expiration of the Statute of Limitations (two years) this attorney advised these men to file suit against the United States under the provisions of the Federal Tort Claims Act and caused to be prepared a complaint for that purpose.

Appellant in the meantime had completed his course of study and his legal clerkship under this same attorney, and having been admitted to the bar, had commenced to practice law and had opened his office in space immediately adjoining the office of the attorney under whom he had studied.

Upon the invitation of this attorney, appellant agreed to assist in the prosecution of the suit against the United States and became, for a time, attorney of record in the case. (TR 180, 203.)

However, within a short time, appellant departed Anchorage and opened his office in Palmer, Alaska, where he resided and practiced law. The attorney who had solicited Shaw's entry into the case, needing the service of a local attorney in the preparation of the

suit, procured the association of George Grigsby, attorney-at-law, and promptly thereafter filed an amended complaint. Appellant, then at Palmer and unavailable for direct assistance, consented to this association. (TR 180 and 181.) Appellant's participation in the case thereafter was of little consequence. He interviewed two or three witnesses and served one or two subpoenas. (TR 205, 225.) The case was set for trial in January of 1953, and just before it came on appellant withdrew as attorney of record. (TR 183.) Appellant had no further connection with the trial or the events connected with the trial which followed.

Following the trial of this tort claims case, which came to be known as the "Dushon case", the trial judge ruled that the plaintiffs did not have a claim against the United States. The Assistant District Attorney, who had represented the United States, one Arthur D. Talbot, promptly caused to be issued an information resulting in the arrest of appellant for allegedly violating Section 284, Title 18, USC. (TR 1.)

Appellant, through his attorneys, moved to dismiss the information on the grounds that the information did not state facts sufficient to charge an offense against the United States. (TR 15.)

This motion was denied. (TR 18.)

Appellant entered a plea of not guilty and the case was set for trial on June 15, 1954. On that date trial was had and the appellant was found guilty of violating Section 284, Title 18, USC and from that conviction brought this appeal.

QUESTIONS PRESENTED.

I.

Did the information on which appellant was tried state an offense against the United States?

II.

Does Section 284, Title 18, USC, cover claims against the United States which arise in tort?

III.

Did the United States prove a violation of Section 284, Title 18, USC?

IV.

Could the subject matter of the work which defendant was hired to perform include an accident resulting from the negligence of third parties?

V.

What is the "claim" involved in the Dushon case?

VI.

Did the claim in the Dushon case involve any subject matter directly connected with which appellant was employed?

ARGUMENT.

POINT ONE.

The Court erred in denying defendant's pre-trial motion to dismiss the information on the ground that it did not state an offense against the United States.

The information did not state an offense against the United States and should have been dismissed on defendant's pre-trial motion to dismiss.

Section 284, Title 18, USC, reads as follows:

> (a) Whoever, having been employed in any agency of the United States, including commissioned officers assigned to duty in such agency, within two years after the time when such employment or service has ceased, prosecutes or acts as counsel, attorney, or agent for prosecuting, any claims against the United States involving any subject matter directly connected with which such person was so employed or performed duty, shall be fined not more than $10,000.00 or imprisoned not more than one year, or both.

The first requirement of a good and sufficient indictment or information brought under this section would be an allegation that the defendant was an employee of the United States. This information states only that "John D. Shaw was employed by the Alaska Railroad, a government agency". There was no allegation that he was an employee of an agency of the United States. The information was therefore defective. The most essential of the various elements necessary for this information to state an offense under Section 284, had not been alleged.

The second element necessary to a good and sufficient indictment or information brought under Section 284 would be an allegation that the defendant prosecuted, or acted as counsel, attorney or agent for prosecuting, a claim against the United States involv-

ing subject matter directly connected with which the defendant was employed or performed duty.

This information charges "that on March 24, 1950, the said John D. Shaw was directly connected with and performed duties relating to an accident which occurred at or about 5:15 P.M. on said day when Extra Train No. 562 South, of the Alaska Railroad came into collision with a gas car and trailers attached, operated by a government contractor, at or near Rainbow at mile 91.7 on the Alaska Railroad". The allegation that the defendant was directly connected with and performed duties relating to *an accident* does not seem to meet the requirements of the statute which provides that the defendant must * * * act as attorney * * * for prosecuting a claim involving subject matter directly connected with which said person was employed or performed duty.

When the specific wording of the information is applied to the specific wording of the statute it appears that the defendant, at least on the face of the information, is not charged with the offense spelled out in the statute. The defendant is obviously not charged with prosecuting a claim involving subject matter with which he was employed or performed duty, but is charged with being directly connected with and performed duties relating to *an accident.* An accident is presumed to arise from negligence. Negligence as such was not within the scope of defendant's employment nor was it included among the duties he performed. An employee in performance of his duty might investigate an accident but this accident was not

the subject matter of the claim. The subject matter of the Dushon claim was the right of Dushon for compensation for the injury sustained by him caused by the negligence of the party responsible.

Does Section 284, Title 18, USC, include claims against the United States which sound in tort?

A careful examination of Section 284, its text, its legislative origin and the intent of congress in enacting the statute will show that claims arising in tort are beyond its purview.

This statute is intended to prohibit former government employees from prosecuting claims against the United States which involve subject matter with which such persons were employed or performed duty.

Section 284, as it appears in Title 18, became law by the enactment of the act of June 25, 1948, Chapter 645, 62 Stat. 698, revised and codified Title 18.

Section 284 is the result of the consolidation of former Section 100 of Title 5, USC, and former Section 119 of Title 41, USC.

The more thought we have given to the meaning of this section the more it appears to require judicial interpretation. In our effort to understand what the congress intended by this consolidation of the two former sections, we went to the revisor's notes. We found that congress intended consolidation only.

There is ample precedent to guide us in this course. In the case of *People v. Fox,* 110 N.E., 26, 29, the Court said:

" 'The rule is elementary that the primary object of construing a statute is to ascertain and give effect to the true intent and meaning of the Legislature in enacting it; that it is 'the intention of the lawmakers that make the law.' Hoyne v. Danisch, 264 Ill. 467, 106 N.E. 341. For the purpose of ascertaining and giving effect to this intention of the lawmakers, it is proper to consider the occasion and necessity for the law . . . Where the spirit and intention of the Legislature in adopting the act are clearly expressed, and its object and purposes are clearly set forth, the courts are not confined to the literal meaning of the words used, when to do so will defeat the obvious legislative intention and result in absurd consequences not contemplated or intended by it. In such cases the literal language of the statute may be departed from, and words may be changed, altered, modified, and supplied, or omitted entirely, if necessary to obviate any repugnancy or inconsistency between the language used and the intention of the Legislature as gathered from a consideration of the whole act and the previous condition of legislation upon that subject.' "

In the case of *Morissette v. United States,* 342 U.S. 246, 265, Justice Jackson, in order to determine the intent of congress in the enactment of Section 641, Title 18, went unhesitatingly to the legislative history. Justice Jackson in that case said:

"This section with which we are concerned was enacted in 1948, as a consolidation of four former sections of Title 18, as adopted in 1940, which in turn were derived from two sections of the Re-

> vised Statutes. The pertinent legislative and judicial history of these antecedents, as well as of section 641, is footnoted. We find no other purpose in the 1948 re-enactment than to collect from scattered sources crimes so kindred as to belong in one category."

In the case of *United States v. Bergson,* 119 Fed. Sup. 459, Judge McLaughlin sought to determine the intent of congress in the enactment of Section 284, and took notice of the legislative history, the revisor's notes, and other data throwing light on the intent of congress and the construction of statutes. Judge McLaughlin particularly quotes with favor Justice Reed's conception of the interpretation of statutes in the case of *United States v. American Trucking Association,* 310 U.S. 534, and then in the *Bergson* opinion, supra, says:

> "Passing the salient statement of the Court that in the interpretation of Statutes there is no more persuasive evidence of the purpose of the Statute than the words by which the legislature undertook to give expression to its wishes, as well as that in which the Court states that often these words are sufficient in and of themselves to determine the purpose of the legislation, this Court goes on to comply with the Supreme Court's injunction, upon which the opinion states emphasis should be laid, to the appraising the purposes as a whole of Congress, or in other words, to look to legislative intent. No judicial construction of the applicable section having been brought to the Court's attention, *the Court turns to the* legislative history of the Act." (Emphasis added.)

The revisor's notes, which immediately follow Section 284 in Title 18, USC, state that a consolidation of Section 100, Title 5 and Section 119, Title 41, was made: (1) with changes necessary to effect the consolidation and, (2) changes in phraseology were made. The reports of congress will show that no enlargement of the scope of these two laws, nor any substantive change in the consolidated sections, was intended by the revisors, or by the congress. (House report No. 304 of the 80th Congress, Page 2443.) During the hearing on revision the chief revisor, one William W. Barron, and the chairman of the committe engaged in a brief discussion on the subject of whether changes in substance would be shown. The discussion as follows:

> "The Chairman. Just to get back briefly to the question of substantial changes in existing law contained in the bill: Am I correct in my understanding that the revisor's notes will set forth clearly what the substantive changes are?
>
> Mr. Barron. Yes.
>
> The Chairman. So that any member of the house or any other interested person, looking at that, can take these notes and determine quickly what the changes have been.
>
> Mr. Barron. In the great majority of cases you will find that only minor changes of phraseology were made. Every substantive change, no matter how minor, is fully explained so that if you in your discretion see fit to make these notes part of your report, they will adequately serve to interpret every proposed change."

Had there been any intent to accomplish more than bare consolidation the revisor's notes would show such

intent. These notes, as they pertain to Section 284, show that *no substantive change was made and no substantive change was intended.*

The report of the Senate Judiciary Committee on revision, filed June 14, 1948, states in the fourth paragraph:

> "This bill makes it easy to find the criminal statutes because of the arrangement, numbering and classification. The original *intent of Congress is preserved,* a uniform style of statutory expressions is adopted." (Emphasis added.) Page 2427, Legislative History.

The report of the House Committee dated April 24, 1947, in the "Preliminary Statement" after showing sources of material and organization said:

> "Revisions, as distinguished from codification, meant the substitution of plain language for awkward terms, reconciliation of conflicting laws, omissions of superseded sections, and consolidation of similar provisions." Page 2435 Legislative History.

The foregoing page numbers refer to pages found in the paper bound advance volume of Title 18, United States Code, "Congressional Services," issued by West Publishing Company prior to the appearance of Title 18 as part of West's United States Code Annotated. The first half of this volume contains Title 18 as revised. The second half of the volume contains the legislative history and the revisor's notes. The writer of this brief was unable to find in the District Court Library at Anchorage, a better reference than this advance paper bound copy of Title 18, Legislative

History and Revisor's Notes. It is presumed that a better reference exists but which at this time is not available in Alaska.

To insure the same source reference, this writer will endeavor to provide for the use of the Court one or more of these paper bound editions of Title 18, "Congressional Service," Legislative History and Revisor's Notes so that the reference source may be available in the event that the Law Library of the United States Court of Appeals, Ninth Circuit, may have discarded the paper bound copy upon receipt of the regular copy of Title 18, USCA, as have so many other libraries.

Other page references contained in this Legislative History and Revisor's Notes which throw light on the revisor's purpose and the intent of Congress are: 2442, 2443, 2471, 2668, 2696 and 2725. On this last page under the heading "Reasons for Enactment" is found the following paragraph and note:

> "6. All offenses are defined simply, thus avoiding repetitions. The only changes of any substance to the criminal statutes are those which harmonize and make uniform the punishment for felonies and misdemeanors in the interest of justice.
>
> * * * * * * *
>
> Note—a codification merely assembles all the laws, no matter how poorly drafted, in a code without attempting to make corrections and improvements; a revision cures the defects and restates the laws simply and understandably."

Neither Section 100 of Title 5, nor Section 119 of Title 41, as they were enacted and interpreted before codification, included claims arising in tort.

Judge McLaughlin, in the *Bergson* case, supra, correctly found that:

> "Section 99 of Title 5 prohibits former officers and employees of the United States from prosecuting any claim against the United States if such claim was pending in the department while they were employed there. This section had its origin in the Post Office Appropriation Bill of June 1, 1872, 17 Stat. 202, Rev. Stat. 190. The section is similar to Section 284 of Title 18 in that it refers to former employees and officers. However, there is a difference, in that Section 284 prohibits prosecuting any claims, while Section 99 refers only to claims in departments. Thus, Section 284 is a broader prohibition than Section 99 only so far as concerns place of prosecution.
>
> Former Section 100 of Title 5 was a section of the Act of July 11, 1919, which was the Army Appropriation Bill of that year. This section prohibited any former commissioned officer or employee of the United States, who had been employed in procuring supplies for the Military Establishment, from soliciting or accepting employment in the presentation of claims against the Government arising out of any contracts or agreements for such supplies. This action was limited in time of application to persons who served in such capacities between April 6, 1917 and July 11, 1919."

Former Section 119 of Title 41 appeared in the United States Code under the main heading of "Public Contracts". Neither that section nor anything similar had ever appeared under the heading of crimes in the United States Code until the appearance of

Section 284 in the 1948 revision of Title 18. Section 119 of Title 41 was sub-section 19(e) of the "War Contracts Settlement Act of 1944" (58 Stat. 667). The subject matter of that act was confined exclusively to the settlement and termination of war contracts, and the penal sub-section 19(e) could logically apply only to the subject matter of the act. Although sub-section 19(e) prohibited the prosecution of any claim against the United States, it is surely not intended to include tort claims. Sutherland on Statutory Construction, Vol. 3 at page 42 citing the cases of *Caminetti v. United States,* 242 U.S. 470, and *Holy Trinity Church v. United States,* 143 U.S. 457, quotes them respectively as follows: "Cases not within the reason, though within the letter, shall not be taken to be within the statute" and "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute because not within its spirit, nor within the intention of its makers."

If claims arising in tort were to be construed to be within the "claim" covered by Section 284, then certain classes of claimants would be denied the remedies available under Federal Tort Claims Act, Section 2674, Title 28 USC.

To illustrate the foregoing proposition we will assume that:

> A, is a registered nurse employed by the United States Public Health Service. While she is so employed she develops a skin infection. B, is a doctor employed by the Public Health Service who treats A. B, through negligence, applies to A's

> skin a solution which contains acid and A's face is disfigured. A subsequently leaves the Public Health Service and within two years of her separation from that service files suit under the Federal Tort Claims Act for damages.

Section 284 which prohibits a former employee from prosecuting, among other things, a claim against the United States within two years after employment has ceased, involving any subject matter directly connected with which the person was employed or rendered service could be invoked against A, if that section were construed to cover tort claims, and if it covered incidental duties connected with employment, or if it is construed to cover appellant.

Judge McLaughlin, in the *Bergson* case, following his examination of the legislative history of Section 284, concluded as follows:

> "This Court has concluded, as aforestated in its foregoing analysis, that the legislative history of Section 284 is such as to persuade the Court that the Term 'Claims against the United States' as used in said Section is intended by Congress to be limited, and consequently that such term is limited to demands against the Government for money or for property."

A similar analysis will show that Congress in using the term "Claims against the United States" in Section 284, intended to limit claims upon the government to those specified in Sections 100 of Title 5 and 119 of Title 41 USC, before revision and codification, and did not by such codification intend to create any new offense.

Section 284 and other related statutes comprise what is known as the so-called "Conflicts of Interest" statutes. In *United States v. 679, 19 acres of land, more or less, etc.,* 113 Fed. Sup. 509, the United States District Court for the District of North Dakota, Vogel J. (decided in 1953), made a careful analysis of Section 283, Title 18, USC, which analysis is pertinent to this appeal. Section 283 is similar to Section 284 in that it prohibits an officer or employee of the United States or any department or agency thereof from acting as agent or attorney for prosecuting claims against the United States or aiding or assisting in the prosecution or support of any such claim otherwise than in the proper discharge of his official duties. The facts show that, one Felix Adams, an employee of the United States Soil Conservation Service, appeared as a witness in behalf of the landowners whose property was being condemned. He had been employed by the landowners to examine their land and testify regarding the same. Government counsel protested, citing Section 283, whereupon Adams refused to testify on the grounds that to do so might incriminate him. In ordering him to testify the Court noted that Adams had examined the landowners' farms on his own time *and had made use of nothing belonging to the government* with the possible exception of tract maps which were available to anyone who asked for them. (Emphasis added.) The Court said:

> "First, the statute did not have in contemplation a situation such as that with which we are here dealing. The statute was passed by Congress for the purpose of preventing government em-

> ployees from making use of *private government information* to assist persons who had claims against the United States. Second, it was also passed by the Congress for the purpose of prohibiting government employees who had access to government files from obtaining therefrom information regarding persons who might possibly have claims against the government and then soliciting the representation of the owners of such claims or assisting them in some way earning fees." (Emphasis added.)

Defendant Shaw was in possession of no information about the Rainbow accident that was confidential or that could be used detrimentally against the United States, as the testimony will show, he had no information, confidential or otherwise, that was not known by every person who read the newspapers or listened to the radio. (TR 116, 117, 206.)

It shows in the testimony that the officials of the Alaska Railroad held an investigation to determine the cause of the Rainbow accident and called into that investigation all persons who had knowledge of the accident. Neither defendant Shaw nor any other person from the dispatcher's office was called to testify at that investigation. Excerpts of testimony from the transcript of record commencing at page 98 and to and including page 109 will show that the railroad officials called into the investigation all persons who could throw light on the cause of the accident and that at the conclusion of that investigation the results showed that no employee of the Alaska Railroad was at fault including the dispatcher's office and including defend-

ant Shaw, and that the negligence which was the cause of the collision was the negligence of the track car operator, an employee of a private contractor. We quote excerpts of the testimony of John Manley, Assistant General Manager of the Alaska Railroad in that connection:

"Q. Mr. Manley, there was a railroad investigation of this matter, wasn't there?

A. Excuse me.

Q. There was a railroad investigation of that matter?

A. There was.

Q. One at Seward and one at Anchorage?

A. I believe that is correct.

Q. And those investigations were determined, to determine how the accident happened and who was responsible for it and all about it, isn't that so?

A. That is right.

Q. And, as a matter of fact, didn't the railroad call in everybody concerned with the accident and in those type of proceedings and try to determine what everybody who has any knowledge about it can tell them to shed light on it?

A. In an accident involving trains normally the train crews are called in.

Q. Well, but you are interested in finding out who was wrong, aren't you? Why the accident happened, that is the reason of the investigation, isn't it?

A. That is correct.

Q. So you had called everybody that could tell you anything that might shed light on how the accident happened and whose fault it was, isn't that a fact?

A. Not necessarily so. In an incident such as this, we normally call in the train crews. The dispatcher's actions are largely a matter of record.

Q. You mean to say—I don't understand you, Mr. Manley—if you are trying to place responsibility for an accident and you hold a railroad investigation, aren't you going to talk to everyone who can shed light on that, how that happened, if they know anything or made any error *of* if they could place any error of being, you are not going to talk to all the employees, but you are going to talk to all of those who can give you pertinent information about the accident, isn't that true?

The Court. Just a moment, please, now what is your question?

Mr. Groh. I again must object to it.

The Court. Objection sustained. If you want to ask him, Mr. Rader, as to what they did in this case, that is satisfactory.

By Mr. Rader. Q. Did you have a Railroad investigation in this case?

A. We did.

Q. And where?

A. I want to ask you if John Shaw was called to either of those to testify or give information?

A. I do not know.

Q. I am handing you a document that is marked Plaintiff's Exhibit No. 6 in Cause A-7605 and A-7603 and ask you if you have ever seen that document before and if you know what it is?

A. I have seen this document or copy of it before.

Q. Do you know what it is?

A. It is a transcript of the investigation held in the Yard Office at Seward, Alaska, on April 1, 1950.

Q. And were you there?

A. No, I was not there.

Q. Were you at the investigation that was held in Anchorage?

A. No, I was not.

Q. I want to ask you if Mr. Shaw was at the investigation held at Seward anyway?

Mr. Groh. Objection, Your Honor. He doesn't know, he wasn't there.

Mr. Rader. Well, he is——

The Court. I point out to you, Mr. Rader, that has already been asked and answered. He said he didn't know whether or not Mr. Shaw——

Mr. Rader. I was trying to refresh his recollection from this document that he wasn't there and he has seen this document in the ordinary course of business.

Mr. Groh. I request that counsel's remarks be stricken, Your Honor.

The Court. Yes, it is argumentative. The jury is instructed not to consider the remark made by counsel. The witness has testified that he was not there in Seward and even though he may have seen other papers, that doesn't prove necessarily that Mr. Shaw wasn't there so, therefore, he testified he doesn't know.

By Mr. Rader. Q. Mr. Manley, do you recognize that as being the official transcript of the proceedings held in Seward?

A. To the best of my knowledge that is a copy of the transcript of the investigation held in Seward.

Mr. Rader. I would like to offer it in evidence.

Mr. Groh. Your Honor, I don't believe he can introduce evidence through my witness.

The Court. It is out of line, Mr. Rader, you should identify it. It may be admitted for identification purposes only, if you so desire.

Mr. Groh. If he wants to introduce it, Your Honor, I suggest he call Mr. Manley back as his own witness.

The Court. Well, he can do it any way he wants to, but at this time if you desire it may be admitted for identification purposes only.

Mr. Rader. All right, fine, I don't want to waste any more of Mr. Manley's time.

The Court. It isn't a question of that. It is a question of doing it right.

Mr. Davis. What will that be, No. 5?

The Court. That will be No. A.

Mr. Rader. Your Honor, it has not been admitted.

The Court. No, identification only.

By Mr. Rader. Q. Mr. Manley, you do know, do you not, as the result of the railroad investigation as to who they placed the responsibility of the accident on?

Mr. Groh. Objection, Your Honor, I don't see the relevancy of this testimony.

The Court. What is the relevancy, Mr. Rader?

Mr. Rader. If it please the court, Mr. Shaw is charged with having instituted a suit within two years of employment and that the subject matter of that employment and the subject matter of the suit are the same in effect. Now, I merely want to show that by the Railroad that they didn't consider that Mr. Shaw had anything to do with the accident and that the responsibility and the sole and complete responsibility for the accident was not the Dispatcher's office or any place else,

but was down on the railroad with the gas car operator and I think this gentleman will so testify. It is very relevant.

The Court. Well, I think it is proper cross examination.

Mr. Groh. Your Honor, if I may be heard.

The Court. Objection overruled.

Mr. Groh. Very well.

The Court. You may answer.

A. The result of the investigation is held by the Railroad and perusal of our, of the Alaska Railroad's train sheets and dispatcher's reports led us to believe that the railroad or railroad personnel were blameless as regards the accident.

Q. That includes the Dispatcher's office?

A. That would include the Dispatcher's office.

Q. That would include Mr. Shaw?

A. That would include Mr. Shaw. That would include all the personnel in the Dispatcher's office.

Q. And you also concluded, did you not, that the reason for the accident was the negligence of one, Mr. Green, the gas car operator, 40 miles down the track south of here, isn't that correct?

Mr. Groh. Your Honor, I object again. I don't think this testimony *if* relevant. Contrary to what Mr. Rader says there is nothing in this information which says that the accident was the responsibility or that John Shaw had anything to do with that accident. All this information says is that he was an attorney for a group of plaintiffs who commenced a lawsuit on the basis of an accident that occurred down on the railroad and that he had been formerly employed by The Alaska Railroad as an Assistant Chief Dispatcher and that is how it comes within this conflict of the statute.

The Court. Mr. Groh, isn't it a question of argument?

Mr. Groh. No, Your Honor, it is a question of relevancy on any question, any bit of evidence on this criminal information and on the rights allowed to Mr. Shaw. This evidence is completely irrelevant.

The Court. Well, the court appreciates the fact that it doesn't have much probative value as to the defense of Mr. Shaw, but, on the other hand, because of the fact that you developed it on direct examination I think it is proper cross-examination.

Mr. Groh. But I don't think I did, Your Honor.

The Court. As I recall, you offered to admit in evidence the Complaint and all of the allegations of the cause of action through this witness, is that not true?

Mr. Davis. Your Honor, I think I might clear this up.

The Court. The court doesn't want to get any more into the act than we have here at the present time and based upon that you opened the door on this type of questioning, therefore, the objection is overruled.

Mr. Groh. Very well.

A. I think it would be more accurate that the Railroad conclusion was that an employee of the contractor was negligent.

Q. Well, without being too precise, the employee of the contractor who operated the gas car, isn't that what it was?

A. That is correct.

Q. M-K?

A. The employee of the contractor who copied the line-up.

Q. Well, at least it wasn't any railroad employee?

The Court. He so testified, Mr. Rader.

Mr. Rader. Well, I am confused here because he said, 'copied the line-up.'

A. We concluded that there was no railroad employee liable or to blame for the accident.

Q. Mr. Manley, this document that you identified, Plaintiff's Exhibit No. 2, let me ask you if—strike that—Mr. Manley, did you make any public statements to the newspapers or otherwise as to the accident?

Mr. Groh. Objection, your Honor.

The Court. Objection sustained.

By Mr. Rader. Q. I am handing you Plaintiff's Exhibit No. 2 and ask you to—I think you previously identified it—and I want to ask you if there is anything in that that is confidential?

A. I would identify this as a routine interdepartmental report.

Q. Merely a report of a practical ordinary event that happened, isn't that a fact? It is not a report that is standard, this is not the accident report or anything of that nature concerning this accident?

A. No, this is not a standard——

Q. You have the official accident records, don't you?

A. That is right.

Q. This is just a memorandum, an inter-office memorandum, more or less?

A. This was an inter-office memorandum submitted for information.

Q. I want to ask you if there is any information in that that is confidential or secret?

Mr. Groh. Your Honor, I object to that.

The Court. Well, I point out to you, Mr. Groh, that it has been admitted in evidence and I think he has a right to go into the nature of it, therefore, I feel that it is proper cross-examination based upon that.

Mr. Groh. Very well, your Honor.

A. I don't understand what is meant by confidential or secret.

Q. Well, let me explain it to you.

The Court. Well, does counsel know.

Mr. Rader. Well, if he doesn't understand I will try to make it clear to him by rephrasing my question.

By Mr. Rader. Q. Is there anything there that would be damaging to the Railroad?

The Court. In that respect, that calls for a conclusion. The objection will be sustained on that. You may ask him who is entitled to this information.

By Mr. Rader. Q. Who is entitled to that information?

A. Those parties to whom it is addressed. In this case it is All Concerned with the accident, all employees concerned with the accident.

Q. Well, that would be quite a number of people, wouldn't it? How do you find out who is concerned with the accident? You just make that thing public, don't you, and send those around to all of the offices?

A. Well, this report would—normally a report of this type would normally go to the Superintendent's office and sufficient copies would be made

so the Superintendent could pass the information along to the other officer, the General Manager, to the office of the Assistant General Manager, to the office of Communication, and in this particular case, to the contracting officer who is administering the contract between Morrison-Knudsen and The Alaska Railroad.

Q. And to Morrison-Knudsen?

A. No, it would not go to Morrison-Knudsen.

Q. Well, let me ask you again then. Using the same wording as before——

The Court. Let's not go back over the same thing.

Q. I withdraw my question. I want to ask him if there is anything confidential in that report?

A. I would say there is nothing more confidential—this report is no more confidential than all routine information reports which emanate from the Dispatcher's office.

Q. Do you recall, Mr. Manley, reading the newspapers immediately after this accident *and your own statement to the newspapers about the accident?*

Mr. Groh. Objection, Your Honor.

The Court. Objection sustained, hasn't any bearing on this witness.

Mr. Rader. Well, if it please the court, this gentleman has testified that it is no more confidential than other memorandums. We can show, I believe, and if I refresh Mr. Manley's recollection, that there is nothing in there that wasn't also in the newspapers.

The Court. I don't—I point out to you, Mr. Rader, that that is argumentative.

Mr. Rader. Well, if the witness has said that it appears to be only for limited or careful consideration—I want to direct the witness' attention to the fact, and I want to refresh his recollection if he did read the newspapers and if that type of thing was public information as to what was on that, was on that piece of paper.

The Court. Well, I point out to you, Mr. Rader, the mere fact it may be in the newspaper, it may be in there wrongly and so it doesn't have any probative value to this case.

Mr. Rader. Well, it certainly couldn't be confidential information if it came out on the 25th of March.

The Court. That is argumentative, Mr. Rader. The court has ruled that you are going too far afield. It is too irrelevant to the issues of this case."

This testimony also shows at pages 108 and 117 that railroad officials issued a statement to the newspapers on the day following the accident and that said newspaper release carried all the information contained in the railroad report following the investigation, and the proceedings at those pages and at page 102 will further show that the Court erroneously refused to let this report into evidence.

We reiterate that the United States in the prosecution of this case failed to show that the defendant had access to information regarding this accident or that he furnished information to anyone regarding this accident. That the railroad had nothing to hide, that officials of the railroad made statements to the press that contained all details of the accident.

In the *Bergson* case, supra, the Court carefully analyzed the legislative history of Section 284, to ascertain the intent of Congress. The results as have been shown limited the term "Claims against the United States" and exonerated Bergson from a charge of violating the statute.

In the case of *United States v. Bramblett,* 348 U.S. 503, the Supreme Court utilized the same process in construing former Section 1001 Title 18 U.S.C. (old) to insure the conviction of Bramblett. Bramblett, a former congressman, was indicted for violation of Section 1001 Title 18. He was tried in the United States District Court for the District of Columbia and was convicted. On a motion for arrest of judgment the Court held that because of the express wording of the statute wherein it prohibited the falsification of a material fact "within the jurisdiction of any department or agency of the United States" that it did not extend to the legislative or judicial branches of government, and exonerated Bramblett.

The Supreme Court went back into the history of this particular piece of legislation to ascertain the intent of Congress, and found that there was no indication that the revision of the statute (1934) was intended to work any substantive change, and that the statute retained its original purpose which before revision would have covered Bramblett's conduct, regardless of the inclusion by the 1934 revisor of the restrictive phrase "in any matter within the jurisdiction of any department or agency of the United States." The trial Court's arrest of judgment was

reversed upon a finding by the Supreme Court after it ascertained the true intent of Congress by a review of the legislative history of the act.

Thus, the intent of Congress, applied to the interpretation of statutes, can result in both acquittal and conviction.

The intent of Congress in the codification of Section 284 is clearly shown in the legislative history, and that showing is to the effect that no new offense has been added to Sections 100, Title 5 or 119, Title 41, U.S.C. as revised and codified.

These two sections were designed and subsequently enacted to cure an existing evil. Each depending on its own test clearly shows its intent, each depending upon its legislative history shows its intent, i.e., to prevent employees of the United States, who in the course of their employment or performance of their duties, become familiar with the matters involving claims against the United States, or matters involving contracts to which the United States is a party, and who having separated from the service of the United States, act as counsel, attorney or agent for the claimant, and because of their unique position are able to lend to the claimant an advantage he did not formerly have.

When these two sections, 100 Title 5 and 119 Title 41, were enacted *the United States was not liable in tort.* Any relief granted to an injured person arising from the commission of a tort by an employee or agent of the United States, must come, if it comes

at all, by special act of Congress and results from the desire of Congress to extend relief. No *right* existed in the injured person to demand or receive such relief.

In 1945 the Congress enacted the Federal Tort Claims Act, Section 2674, Title 28, U.S.C., *and for the first time claims arising in tort could be filed against the United States,* by persons injured through the negligence of agents of the United States.

The possibility, therefore, that either Sections 100, Title 5 or 119, Title 41, could have included claims arising in tort, is eliminated, for the obvious reason that there existed no *right in any person to claim against the United States in tort,* at the time the two foregoing sections were enacted, and not until 1945 did the Congress by enactment of section 2674, Title 28, U.S.C., create such a right.

Section 284, Title 18, limited as it was at its enactment, to bare consolidation, as the history of the legislation will clearly demonstrate, could not embrace a claim arising in tort.

POINTS TWO AND THREE.

The Court erred in denying defendant's motion for Judgment of Acquittal at the conclusion of the government's evidence. The defendant contends that the government failed to prove a violation of Section 284, Title 18, U.S.C., and the Court again erred in denying the renewal of the motion at the close of the trial.

The burden was on the United States to prove that the defendant had violated Section 284, Title 18, U.S.C. If the United States failed to prove beyond a reasonable doubt that the defendant had violated Section 284, then the defendant was entitled to a judgment of acquittal and the Court should have granted the motion.

The Court instructed the jury as to the "burden of proof beyond a reasonable doubt" in the following language:

> "3. The essential elements of this crime, each of which the government must prove beyond a reasonable doubt are:
>
> (1) That the defendant was employed by a *governmental agency,* namely, the Alaska Railroad. (Emphasis added.)
>
> (2) That the defendant prosecuted or acted as counsel, attorney, or agent for prosecuting a claim against the United States.
>
> (3) That the claim which defendant prosecuted or for which he acted as counsel, attorney or agent in prosecuting involved subject matter directly connected with defendant's employment or service with the Alaska Railroad.
>
> (4) That the defendant prosecuted or acted as counsel, attorney or agent for prosecuting such claim within two years after his employment had ceased." (TR 37, 38.)

The Court, having instructed the jury on what the Court considered the elements of proof to be, continued to instruct as follows:

> "You are instructed as a matter of law that the Alaska Railroad is a *governmental agency* within the meaning of the above quoted statute." (TR. 38.) (Emphasis added.)

We believe that while it is understandable that a prosecuting attorney may draw an inexact and sometimes defective indictment based on his lack of understanding of the law or the facts or resulting from his confusion (TR 1), the Court, upon which falls the responsibility of correctly instructing the jury as to the law, ought not be confused or mistaken in its conceptions of the law, otherwise a jury must necessarily deliberate without the guidance of law.

The Court instructed the jury, that to convict, the government must prove that the defendant was employed by a *governmental agency,* namely the *Alaska Railroad.* What the Court should have stated was that the jury, in order to convict under Section 284, would have to find that the defendant was employed by an *agency of the United States.* Section 284 makes no reference to employment by a *governmental agency.* A governmental agency, as such, means nothing because government exists on many levels. This instruction fails to differentiate, or to state that by the term "governmental agency" it meant an agency of the United States.

This misleading and defective instruction was not cured by the Court's attempt to take judicial notice of the status of the Alaska Railroad.

The Assistant U.S. Attorney during the examination of one John Manley, Assistant General Manager of

the Alaska Railroad, urged the Court to take judicial notice that the "Alaska Railroad is a governmental agency." (TR 74, line 21.) This the Court declined to do. (TR 74, line 24.) However, when the Court instructed the jury it said:

> "You are instructed as a matter of law that the Alaska Railroad is a *governmental agency* within the meaning of the above quoted statute." (Emphasis added.)

Such an instruction is meaningless because the phrase "governmental agency" is a loose term without identification. The additional phrase contained in the instruction "within the meaning of the above quoted statute" does not sufficiently identify or instruct because the phrase "governmental agency" is not to be found in the statute. Whatever the Alaska Railroad is, it is not a *governmental agency.* Judicial notice could be taken that it is a railroad system, carrying goods and passengers as a common carrier, engaged in interstate commerce, for profit, in competition with other common carriers engaged in passenger and freight carriage, and is owned by the United States.

The Court instructed the jury in Instruction No. 3, sub-paragraph 2, that the government must prove beyond a reasonable doubt that "the defendant prosecuted or acted as counsel, attorney, or agent for prosecuting a claim against the United States." In this connection the government did prove, and the defendant did admit, that he did, on or about the 22nd day of March, 1952, join another attorney in filing a com-

plaint under the Federal Tort Claims Act. There was, however, a complete failure of proof as to the third point which the Court instructed the jury the government was required to prove.

In support of this contention the following facts are set forth:

The government showed by its evidence that the defendant was a train dispatcher. That on the day of the collision he was working the afternoon and evening trick in the dispatcher's office. The evidence further showed that on that afternoon, the movement of trains on the Alaska Railroad was controlled by two dispatch boards or control boards. The north board controlled the movement of trains between Curry (halfway point) and Fairbanks (last station north). The south board controlled the movement of trains between Curry (halfway point) and Seward (last station south). Anchorage, location of the dispatcher's office, and Rainbow, scene of the collision, came within the terriorial limits of the south board. (TR 93.)

The evidence further showed that the defendant was working a combined job, i.e., Assistant Chief Dispatcher and dispatcher in charge of the north board. (TR 96, 156.)

Mr. Kerwin Frank called by the prosecution testified as follows (TR 155):

> "Q. Mr. Frank, would you tell the court and jury what part Mr. Shaw took in directing that Extra 562 South and back into Anchorage?

A. Well, any part that Mr. Shaw took in bringing Extra 562 back to Anchorage was by my own request because of my physical sickness which was caused by the information I received and because of my mental—I was mentally perturbed—I asked him to bring the train back and he issued the orders for the train to return.

The Court. I take it then you were working the south board?

A. I was a dispatcher on duty on the south board between Curry and Seward."

Mr. Frank further testified as follows:

"The Court. I think the witness has testified he was working the south board and Mr. Shaw was working the north board. Now, you may inquire along those lines. That would be proper cross-examination.

Mr. Rader. Well, that is what I was meaning to do. If I did something else I didn't mean to.

The Court. You may proceed then.

By Mr. Rader. Q. Mr. Frank, who did receive the first notice of the accident?

A. I did.

Q. I want you to tell us now exactly what happened at that time.

A. Well, a man came on the phone and asked for a dispatcher. I answered him and he said there had been an awful bad accident. That there were dead men laying all over the right-of-way and that they were putting them in the baggage car. They were backing back to Rainbow and wanted orders to return to Anchorage. They would be ready to leave in about 15 minutes. I became physically sick and mentally perturbed and I asked Mr. Shaw to take over.

Q. I want to ask you, whose responsibility was it to bring the train back to Anchorage?

A. That was my responsibility."

And again Mr. Frank testified as follows:

"Juror. When you became sick, wasn't it the Assistant Chief dispatcher's job to take over?

A. No.

Juror. I was just trying to get it straight in my own mind.

A. Mr. Shaw informed me that it was my responsibility to return the Passenger Extra 562 north to Anchorage and then it was a rule of the Railroad that only one dispatcher would issue train orders on any shift and that I would be in violation of the rules if I allowed him to do so, but I felt that because of his greater experience and my 5 months as a dispatcher—I compared them both and the physical feeling I had inside and the mental feeling I had in my head—I felt that he could better serve the interest of the Railroad and especially the people who were dead or injured. I don't think that Mr. Shaw necessarily had to do it. I could have done it, but it would have taken a little longer."

From the government's evidence on this point and giving it the best possible weight, we must conclude that some 24 miles south of Anchorage on the main line track of the Alaska Railroad a train was moving south under a train order and a motor car pulling man-haul cars was moving north, operated by a private contractor's employee (TR 1) who was under a duty not to operate except when the track was clear, and that the two movements met head on, resulting in

the injuries which were the subject of the Dushon claim. At the instant of impact the negligence which caused the collision and the injuries resulting from the collision were instantaneously effective.

When the news of the collision reached the dispatcher's office the *subject matter* of the Dushon claim was in existence and was frozen at the instant of the collision as to cause and effect. When the news reached the dispatcher's office the shock of dead and dying and the horror of mangled bodies so upset the dispatcher that he called on defendant, who left his position on the north board and promptly issued the necessary train order to back the train to Anchorage with the dead and injured aboard. The defendant subsequently made a report on the face of the dispatcher's sheet as to the incident. (TR 86.)

The action of the defendant, in response to an invitation of an incapacitated train dispatcher, in issuing the train order to bring back Extra 562 South, with the bodies of the dead and injured aboard was the only connection the defendant had with the accident as the government's evidence shows. All of the elements composing the Dushon claim were then in existence. The defendant's employment did not embrace any subject matter involved in the Dushon claim. The defendant had, prior to the accident and at the time of the accident, no direct connection with the movement of any train on the south board and had no direct connection with the movement of Extra 562 South. Defendant's duties were not directly or indirectly connected with the contractor's employee

who operated the gas car, and assuredly defendant's employment was not connected with the negligence which brought about the collision or the injuries suffered by Dushon and others. The *subject matter* of Dushon's claim, i.e., a right of compensation in the plaintiff, the negligence and the injuries, was in no way connected with defendant's employment, or in the issuance of the train order which returned the train and injured passengers to Anchorage.

In *Reed v. City of Muscatine,* 73 N.W. 579, the Court defined "subject matter of a claim" as follows:

> "Within the rule that jurisdiction is the power to hear and determine the subject matter in controversy, the *subject matter* is the *right* which one party claims against another and demands judgment by the court upon. In an action for personal injuries it is the *right* which the plaintiff has for compensation for *injuries* received through the *negligence* of the defendant." (Emphasis added.)

The government failed, in presenting its evidence in chief, to prove that the defendant acted as attorney in the prosecution of a claim against the United States involving any *subject matter* connected with which the defendant was employed or performed duty.

The government likewise failed to prove that the defendant acted as attorney in the prosecution of a claim involving subject matter *directly connected* with which defendant was employed or performed duty.

The motion for judgment of acquittal should have been granted and the Court in failing to grant the same committed error.

The failure to grant the motion at the close of the trial for the same reasons was likewise error.

POINTS FOUR TO FOURTEEN.

Rule 30, Federal Rules of Criminal Procedure, provides that at the close of the evidence the judge shall instruct the jury on the *law* of the case.

This rule also provides that any party may submit written requests for instructions.

The Court, as we have previously noted in argument on Points Two and Three, erroneously instructed the jury on the subject of those elements of proof which were incumbent upon the government to prove. For the purpose of this argument we will restate the matter briefly.

The Court instructed the jury (TR 37) on the elements which the government was required to prove, and erroneously instructed that the government was required to prove that defendant was an employee of a *governmental agency,* namely the Alaska Railroad, and failed to instruct, that the government must prove that the defendant was employed by an *agency of the United States.*

These instructions were of course misleading. If the government had proved that defendant was an employee of a governmental agency, and the Alaska

Railroad had been owned by the Territorial Government, the jury under these instructions could have found defendant guilty in this case.

Instruction numbered 3, sub-paragraphs 1, 3 and 4, again refers to the *Alaska Railroad* and not to an *agency* of the *United States.* (TR 37, 38.) In fact, the Court instructed that the government would be required to prove that the claim involved subject matter directly connected with defendant's former employment or *service* with the Alaska Railroad. There is considerable difference between "service" and "performance of duty".

The further paragraph of Instruction No. 3 in which the Court instructed the jury that as a matter of law the *Alaska Railroad* is a *governmental agency,* within the meaning of the statute is misleading because the statute requires the defendant to have been employed by an *agency* of the *United States* and not by a mere unidentifiable governmental agency. The phrase "governmental agency" does not appear in the statute.

POINTS FOUR TO FOURTEEN CONTINUED.

The Court erred in failing to perform its function instructing the jury on the law, leaving the jury the responsibility of placing its own interpretation on a difficult and technical penal statute involving questions of law.

Section 284 is one of the most difficult and elusive statutes the writer of this brief has been called upon to analyze.

It requires constant effort to keep its various parts in order. It raises difficult questions of law in almost every line.

It involves such questions as:

(1) What is an agency of the United States?

(2) What does the word prosecute or prosecution mean? Does, to prosecute, apply to a person who lends his name to a complaint commencing a prosecution but withdraws before trial, or does prosecution mean a complete and full prosecution, from complaint to judgment?

(3) What is a claim against the United States? Judge McLaughlin demonstrated the difficulty with that term by utilizing many pages of opinion to define it. *Bergson* case, supra.

(4) What is the subject matter of a claim? Controversies have developed over the meaning of that phrase and judges have labored over definitions.

(5) What is meant by "directly connected with"?

(6) What is mean by the term "with which such person was employed or performed duty"?

All or most of these words, phrases and terms are difficult—yet the Court permitted this case to go to the jury of ordinary men and women, businessmen, laborers and housewives, *without a word of guidance in the instruction as to what these words, phrases, or terms meant in law and in fact,* or as they might be applied to this defendant.

Counsel for defendant took exception to the Court's instructions, among other reasons, because it left to

the jury the task of forming its own appraisals of those technical questions involving points of law. (TR 243.)

Counsel for defendant offered several instructions which would have furnished guidance to the jury on the difficult words, phrases and terms of the statute but the Court rejected each one.

Defendant's proposed Instruction No. 1 defined "subject matter." (TR 33.)

Defendant's proposed Instruction No. 2 defined the phrase "directly connected with", furnishing citations of authority. (TR 33.)

Defendant's proposed Instruction No. 3 pertained to the defendant's emergency service in taking over the south board of the trick dispatcher's office at the request of the dispatcher and ordering the train returned to Anchorage, bringing in the injured persons and arranging for medical care and hospitalization, and showed that this act was subsequent to the time the right of the injured to prosecute a claim, i.e., the time the negligence and the injuries came into existence, or, in other words, after all the elements of the claim were in existence. The act of defendant in issuing the train order to move the train back to Anchorage and secure aid for the injured had nothing whatever to do with the claim. The performance of this act did not involve any feature or element of the "Claim."

The Court's rejection of these proposed instructions was error.

It is interesting to note that although the Court referred to "governmental agency" in its instructions and not to an agency of the United States, as it should have done, that during the entire case in chief the prosecution attempted to prove that the Alaska Railroad was a "governmental agency" and attempted to have the Court take judicial notice that the Alaska Railroad was a "governmental agency" and nowhere in the trial of this case did the prosecution refer to the Alaska Railroad as an agency of the United States. The Alaska Railroad is not a "governmental agency" and probably is not an agency of the United States. It is a railroad system built with public monies, operated competitively in the freight and passenger field, is maintained as to equipment and operation under railroad rule books and in accordance with regulations of railroads in the United States. Most of its personnel are unionized in the four railroad brotherhoods and other national unions. As we said before, it is not a governmental agency within the meaning of that phrase as it has been judicially defined in numerous decisions annotated in West Publishing Company's "Words and Phrases".

CONCLUSION.

In conclusion we urge that the judgment of conviction be reversed on the grounds that the information did not sufficiently charge the defendant with a violation of Section 284, Title 18, USC; that Sections 100, Title 5 and 119, Title 41, USC, as consolidated in

Section 284, did not create new offenses or change the substantive law and therefore did not apply to claims in tort; that the subject matter which the Dushon claim involved had no connection, either direct or indirect, with the defendant's employment; that the Court's instructions were erroneous because they incorrectly outlined the burden of proof resting on the government by referring to "governmental agency" and not to an agency of the United States, and further instructed so inadequately that the jury had no guide as to the technical terms of the statute and thus its meaning and intent; that the Court's rejection of defendant's proposed instructions, while failing to instruct along similar lines, was error; and for other reasons arising in justice and equity.

Dated, Anchorage, Alaska,
May 21, 1956.

Respectfully submitted,
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